1990

State of Utah v. Timothy Kevin Duncan : Brief of Appellee

Utah Court of Appeals

R. Paul Van Dam; Attorney General; David B. Thompson; Assistant Attorney General; Attorney for Appellee.
Charles F. Loyd, Jr., Ronald S. Fujino; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

DOCKET NO. 900217-CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 900217-CA
v.	:	
TIMOTHY KEVIN DUNCAN,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS OF RECEIVING STOLEN PROPERTY, A SECOND DEGREE FELONY, AND THEFT BY DECEPTION, A CLASS B MISDEMEANOR, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, THE HONORABLE KENNETH RIGTRUP, JUDGE, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

CHARLES F. LOYD, JR.
RONALD S. FUJINO
Salt Lake Legal Defender Assoc.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

CHARLES F. LOYD, JR.
RONALD S. FUJINO
Salt Lake Legal Defender Assoc.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from convictions of theft by deception, a class B misdemeanor, under Utah Code Ann. § 76-6-405 (1990), and receiving stolen property, a second degree felony, under Utah Code Ann. § 76-6-408 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The sole issue on appeal is whether the trial court correctly prohibited defendant from impeaching a prosecution witness with a prior conviction.

"[T]rial court rulings on the admissibility of evidence are not to be overturned in the absence of a clear abuse of discretion." State v. Griffiths, 752 P.2d 879, 883 (Utah 1988).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional, statutory, or rule provisions pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Timothy Kevin Duncan, was charged with receiving stolen property, a second degree felony, under Utah Code Ann. § 76-6-408 (1990), and theft by deception, a class B misdemeanor, under Utah Code Ann. § 76-6-405 (1990) (R. 6-7).

After a jury trial, defendant was found guilty as charged (R. 67-68). The trial court sentenced defendant to the Utah State Prison for concurrent terms of one to fifteen years for the felony conviction and six months for the misdemeanor conviction, those terms to run consecutively to sentences defendant was then serving (R. 77).

STATEMENT OF FACTS

For purposes of the issue raised on appeal, the pertinent facts are those set out above in the Statement of the Case and below in the argument portion of this brief.

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in prohibiting defendant from impeaching a prosecution witness with a prior conviction that was not admissible under rule 609, Utah Rules of Evidence.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN PROHIBITING DEFENDANT FROM IMPEACHING A PROSECUTION WITNESS WITH A PRIOR CONVICTION THAT WAS NOT ADMISSIBLE UNDER RULE 609, UTAH RULES OF EVIDENCE.

Prior to trial, defendant sought a ruling from the trial court allowing him to impeach the prosecution's chief

witness with a prior conviction under rule 609(a)(1), Utah Rules of Evidence (T. 75-80). The court denied the motion, concluding that the conviction was not one which could be used to impeach the witness under rule 609(a) because it was a misdemeanor conviction not punishable by imprisonment in excess of one year and did not involve a crime of dishonesty or false statement (T. 81). It stated:

> The Court concludes that the order of May 2nd, 1986, signed by Judge Sawaya is the actual conviction. And that on its face indicates that the crime is Attempted Unlawful Distribution for Value of a Controlled Substance, a Class A Misdemeanor.
>
> Accordingly, under 609(a), the Court concludes that it is not a conviction involving imprisonment for over one year. So, for that reason, I will not allow you to use that for impeachment purposes.

(T. 81).

On appeal, defendant argues that the trial court erred in not allowing impeachment based on the prior conviction. He claims that the witness's conviction of attempted unlawful distribution for value of a controlled substance, which was based on a guilty plea and entered as a conviction of a class A misdemeanor pursuant to Utah Code Ann. § 76-3-402(1) (1990), should have been treated as a felony conviction for purposes of rule 609(a).

According to the representations of defense counsel in the trial court, the prosecution's chief witness, Mike Skillings, had been charged with unlawful distribution for value of a controlled substance, a second degree felony. He pleaded guilty to the lesser charge of attempted unlawful distribution of a

controlled substance, a third degree felony, and the trial court entered a conviction for that offense as a class A misdemeanor pursuant to section 76-3-402(1) (T. 76-77).

Rule 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The rule focuses on a prior conviction and refers specifically to the "law under which [the witness] was convicted." Thus, the specific question presented here is whether the trial court correctly concluded that Skillings's prior conviction was a misdemeanor conviction not punishable by imprisonment in excess of one year and therefore inadmissible under rule 609(a)(1).

There appears to be no dispute that Skillings's prior conviction of attempted unlawful distribution for value of a controlled substance resulted from his entry of a guilty plea to a charge of that third degree offense.[1] However, contrary to defendant's view, Skillings's guilty plea did not in itself constitute a conviction; it was nothing more than "an

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[1] Neither the order signed by Judge Sawaya with respect to Skillings's prior conviction nor any documentation of the plea entered by Skillings appears in the record before this Court. However, because the prosecutor did not disagree with defense counsel's representations regarding those matters in the trial court (T. 75-81), the State will assume that what defense counsel represented was accurate.

acknowledgment that the accused is guilty of the offense charged." Utah Code Ann. § 77-13-2(1) (1990). The relevant reference point for rule 609(a) is not the guilty plea but rather the judgment of conviction that was entered.

Section 76-3-402(1) provides:

> If the court, having regard for the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to record the conviction as being for that category of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may, unless otherwise specifically provided by law, enter a judgment of conviction for the next lower category of offense and impose sentence accordingly. [Emphasis added.]

Although Skillings pleaded guilty to a third degree felony charge, his conviction, entered as a "judgment of conviction" by the court under section 76-3-402(1), was for a class A misdemeanor. That statute does not merely allow the court to sentence a defendant to a sentence associated with a lower category offense, it allows the court to "enter a judgment of conviction for the next lower category offense." In fact, in Skillings's case, the court entered a judgment of conviction for a class A misdemeanor. Therefore, under the plain language of section 76-3-402(1) and the court's judgment, Skillings's prior conviction was for a category of offense that was not punishable by imprisonment in excess of one year. See Utah Code Ann. § 76-3-204(1) (1990) (class A misdemeanor punishable by imprisonment for a term not exceeding one year).

That the judgment of conviction is the relevant reference point rather than the guilty plea is supported by State v. Theison, 709 P.2d 307 (Utah 1985) (per curiam). There, in declining to address the defendant's challenge to the district court's denial of his petition for expungement of his arrest and conviction because there was an inadequate record on appeal, the Utah Supreme Court said:

> Our examination of the record fails to disclose any conviction of defendant to be expunged. The minute entry of his May 9, 1980 arraignment indicates that upon defendant's guilty plea to "THEFT 2nd Degree," the matter was merely continued for sentence and defendant referred to the probation department for a presentence report. The subsequent minute entry of May 23, 1980, provides only that at the time set for the sentence on the felony charge the trial court placed defendant on probation under the supervision of the probation department. There is nothing in the record before this Court to show any acceptance of the guilty plea, findings, conviction, judgment, or imposition of sentence by the lower court upon defendant.
>
> Without any indication in the record of the proceedings below concerning the disposition of the second degree felony charge against defendant, we cannot determine in what manner the court acted. It is possible that the court intended to enter defendant's conviction, impose sentence which was stayed, and place defendant on probation. But the record does not so indicate.

709 P.2d at 308 (footnote omitted; emphasis added). It is obvious from the foregoing that the supreme court did not consider the entry of a guilty plea to be a conviction; after entry of the plea, there is no conviction until the court has accepted the plea and entered a judgment of conviction. See also Utah R. Crim. P. 11(5). Theison makes equally clear that section

76-3-402 is not merely a sentencing statute, for it "allows a court the discretion in appropriate cases to enter a conviction for the 'next lower category of offense and impose sentence accordingly.'" Id. at 308 n.1 (emphasis added).

State v. Delashmutt, 676 P.2d 383 (Utah 1983) (per curiam), cited by defendant in support of his contention that a guilty plea standing alone constitutes a conviction, is not inconsistent with this view. In that case the supreme court obviously assumed that the defendant's prior guilty plea had been accepted by the trial court and a judgment of conviction had been entered on the plea at the time sentence was imposed. Id. at 384. And, insofar as United States v. Turner, 497 F.2d 406 (10th Cir. 1974), cert. denied, 423 U.S. 848 (1975), which construed Oklahoma law, may suggest a different conclusion, it is inconsistent with Theison and the plain language of section 76-3-402(1) and rule 609(a). Furthermore, Turner by no means expresses the only view on the subject. As noted in United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), cert. denied, 434 U.S. 1073 (1978) (holding that a verdict of guilty where judgment and sentence have not been entered is admissible for impeachment purposes under Fed. R. Evid. 609):

> By this holding we intimate no view as to the admissibility for impeachment purposes of pleas of guilty standing alone without a judgment of conviction and imposition of sentence. At least one circuit has held that "a guilty plea is a confession of guilt and amounts to a conviction" for impeachment purposes, United States v. Turner, supra, 497 F.2d at 407, while other circuits have held otherwise. United States v. Lee, 166 U.S.App.D.C. 67, 509 F.2d 40[0] (1974); United States v. Semenson, 421 F.2d 1206 (2d Cir. 1970).

560 F.2d at 1241. Indeed, generally when courts refer to guilty pleas for purposes of impeachment under rule 609(a), they talk about guilty pleas that have resulted in conviction. For example, as the court stated in United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980):

> A guilty plea which results in conviction is of course fully equivalent for impeachment purposes to a determination of guilt following trial. A guilty plea is thus fully admissible for impeachment purposes, assuming the prerequisites of Rule 609 of the Federal Rules of Evidence are satisfied.

636 F.2d at 545-46 n.32 (citation omitted; emphasis added). See also Trindle v. Sonat Marine Inc., 697 F. Supp. 879, 881 n.4 (E.D. Pa. 1988); Tussell v. Witco Chemical Corp., 555 F. Supp. 979, 981 n.3 (W.D. Pa. 1983). Cf. State v. Cash, 40 Ohio St.3d 116, 532 N.E.2d 111, 113 (1988) (guilty plea constituted prior conviction which could be used for impeachment, even though pronouncement of sentence still pending).

Thus, the trial court correctly ruled that Skillings's prior misdemeanor conviction was not admissible to impeach him under rule 609(a).[2] See State v. Bruce, 779 P.2d 646, 653 (Utah 1989) ("convictions for crimes not involving dishonesty or false statement cannot be used for impeachment purposes in Utah unless they are felony convictions and the trial court has applied the proper balancing test under . . . rule [609]"); State v. Brown,

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[2] In addition to ruling that the prior conviction was not punishable by imprisonment in excess of one year, the court ruled that it was not a conviction of a crime which involved dishonesty or false statement (see rule 609(a)(2)) (T. 81). Defendant does not argue that the prior conviction, even if for a misdemeanor, was nevertheless admissible under rule 609(a)(2).

771 P.2d 1093, 1094 (Utah Ct. App. 1989) (under rule 609(a), trial court improperly ruled that the defendant's prior misdemeanor convictions of theft were admissible for impeachment without first determining whether they involved dishonesty or false statement); State v. Morehouse, 748 P.2d 217, 221 (Utah Ct. App.) ("Under subsection (a)(1) of Rule 609, the DUI conviction was not admissible because not punishable by more than one year's imprisonment."), cert. denied, 765 P.2d 1278 (1988). See also United States v. Nichols, 808 F.2d 660, 664 (8th Cir.) (trial court properly refused to allow the defendant to question FBI agent, the government's principal witness, about a traffic conviction for DUI; because conviction did not permit imprisonment greater than one year and crime did not involve dishonesty or false statement, it was not admissible under rule 609(a), Federal Rules of Evidence), cert. denied, 481 U.S. 1038 (1987); United States v. Lane, 708 F.2d 1394, 1398 (9th Cir. 1983) (district court did not err in excluding evidence of government witness's prior arson conviction where witness had withdrawn original guilty plea to felony and had pleaded guilty to lesser included misdemeanor offense).[3] The court's ruling serves both the purpose of section 76-3-402(1) (i.e., entry of a conviction for a higher category offense should not be made when, "having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and

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[3] The appellate courts of this state look to the interpretation of the federal rules of evidence by the federal courts to aid in interpreting Utah's rules of evidence. State v. Banner, 717 P.2d 1325, 1333-34 (Utah 1986).

character of the defendant," such would be "unduly harsh") and of rule 609(a) (i.e., limiting the admissibility of prior convictions for impeachment).

Because defendant fails in his challenge to the trial court's determination that Skillings's prior conviction was a misdemeanor conviction which could not be used for impeachment under rule 609(a), his additional point regarding the need to perform the weighing function required in certain circumstances under rule 609(a)(1) need not be addressed.

CONCLUSION

Based on the foregoing arguments, this Court should affirm defendant's convictions.

RESPECTFULLY submitted this 16th day of October, 1990.

R. PAUL VAN DAM
Attorney General

David B. Thompson
DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Charles F. Loyd, Jr., and Ronald S. Fujino, Attorneys for Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 16th day of October, 1990.

David B. Thompson